

87-1723

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

C. M. ENGLISH, Petitioner

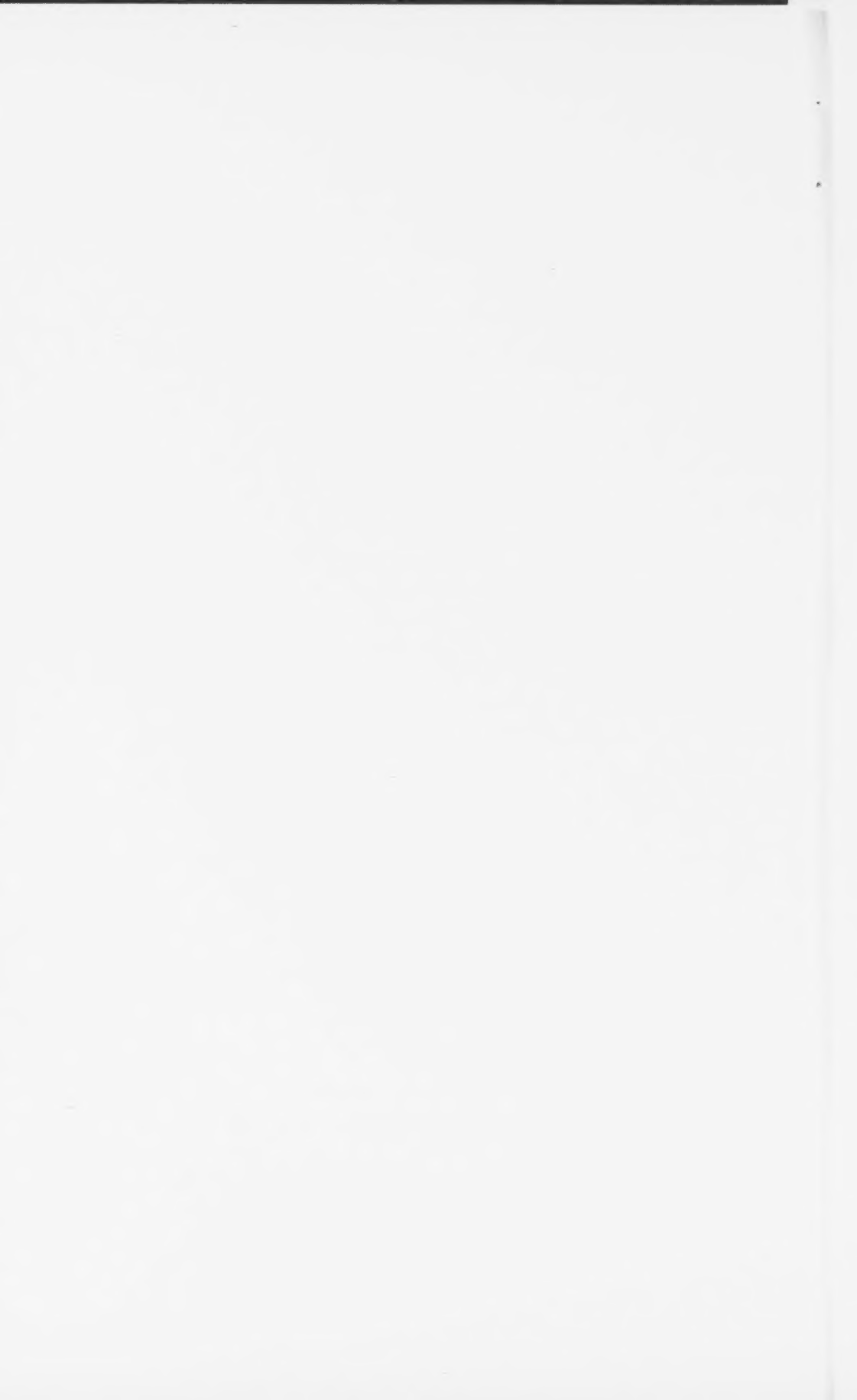
v.

PABST BREWING COMPANY and PMP FERMENTATION
PRODUCTS, INC., a wholly owned subsidiary
of PABST BREWING COMPANY., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

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QUESTIONS PRESENTED

1. WHETHER THE NOTICE REQUIREMENTS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) MAY BE EQUITABLY TOLLED UNTIL SUCH TIME AS AN EMPLOYEE OBTAINS KNOWLEDGE THAT HIS JOB TERMINATION WAS DISCRIMINATORY, THEREBY ELIMINATING THE NEED TO FILE A CHARGE OF DISCRIMINATION UPON DISMISSAL WHETHER OR NOT INDICIA OF AGE DISCRIMINATION ARE PRESENT?
2. WHETHER THE COURT OF APPEALS COMMITTED ERROR BY EMBRACING THE DISTRICT COURT'S EVALUATION OF THE FACTS OF THIS CASE AND, IN SO DOING, UNDERTOOK TO RESOLVE GENUINE FACTUAL DISPUTES?

LIST OF PARTIES

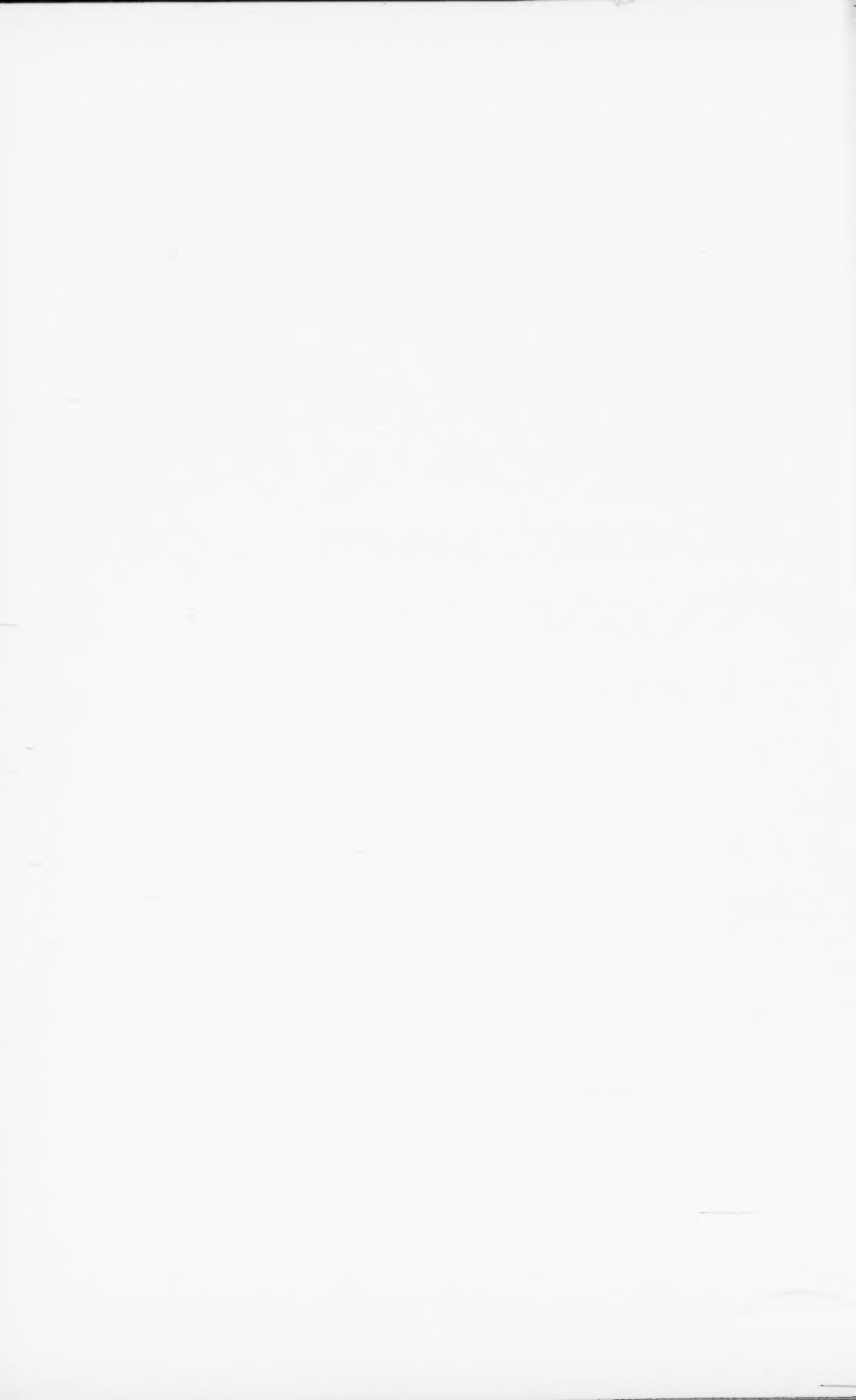
The parties to the proceedings below were the petitioners, C. M. ENGLISH, and the respondents, PABST BREWING COMPANY and PMP FERMENTATION PRODUCTS, INC., a wholly-owned subsidiary of PABST BEWING COMPANY. The parties are still before this court on this petition.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

C. M. ENGLISH, Petitioner

v.

PABST BEWING COMPANY and PMP FERMENTATION
PRODUCTS, INC., a wholly owned subsidiary
of PABST BREWING COMPANY, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

The petitioner, C. M. English, respectfully
prays that a writ of certiorari issue to re-
view the judgment and opinion of the United
States Court of Appeals for the Fourth Cir-
cuit, entered in the above-captioned proceed-
ing on September 15, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for
the Fourth Circuit is reported at 828 F. 2d
1047 and is reprinted in the appendix
hereto.

The memorandum of decision of the United States District Court for the Western District of North Carolina is reported at 645 F. Supp. 186 and is reprinted in the appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. §626 (b), the petitioner brought this action in the Western District of North Carolina. On October 8, 1986, the District Court granted respondents' Motion for Summary Judgment.

On petitioner's appeal, the Fourth Circuit on September 15, 1987, entered judgment and an opinion affirming the District Court's decision and order. No petition for rehearing was sought.

The jurisdiction of this court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

29 U.S.C. §626 (d) Record keeping,
investigation and enforcement: Filing of
charge with Commission; timeliness,
conciliation, conference and persuasion.

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

- 1) Within 180 days after the date the alleged unlawful practice occurred; or
- 2) In a case to which section 633 (b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all

persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

STATEMENT OF THE CASE

The petitioner was employed by the respondents as a field sales representative on August 4, 1958 until his termination on February 15, 1982.

Following his termination, the petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission district office in Charlotte, North Carolina alleging that he had been discriminated against on account of his age by his involuntary separation. Thereafter, the petitioner brought this action in the United States District Court for the Western District of North Carolina, pursuant to §7 (b) of the Age discrimination and

Employment Act (ADEA), alleging therein that the respondents had unlawfully and impermissibly terminated his employment in the violation of the provisions of the ADEA, and sought as damages his unpaid compensation and benefits to which he would have been entitled.

Upon being employed by the respondents as a field sales representative in 1958, the petitioner was first assigned responsibility for sales of the respondents' product line, including malt products, in the southeastern United States. Subsequent to his employment, the petitioner's sales territory was extended beyond its original bounds including the states of North Carolina, South Carolina, Georgia and Florida, to also include Virginia, Tennessee, West Virginia and the eastern half of Tennessee.

In 1973, the petitioner was assigned sales responsibilities within his territory for chemical products, including enzymes and gluconates, in addition to malt products.

At the time the petitioner was first given chemical sales accounts as part of his sales responsibilities, the approximate annual average sales generated in the sales territory for which he was responsible, was \$35,000.00. By 1981, the chemical sales accounts in this territory had increased to approximately \$250,000.00 annually. In 1978, the petitioner's sales territory was once again extended to include the remaining portion of the State of Tennessee and all of Mississippi and Louisiana. In addition, the petitioner assumed even more malt sales accounts due to an acquisition of another company by the respondents.

At all times during the course of the petitioner's work with the respondents, his job performance received only favorable and acceptable ratings. At no time during the course of his employment, was the petitioner notified by the respondents that he was deficient in any skills or

qualifications necessary to handle sales of either chemical products or malt products in his territory. In the time period immediately preceding his termination in February, 1982, the petitioner had received no information or indication from the respondents that they were considering the possibility of restructuring or altering their work force in any manner.

In February, 1982, the petitioner was summoned to the Milwaukee, Wisconsin headquarters of the respondents and was informed on February 9, 1982, the date of the petitioner's 65th birthday, by his two sales supervisors that he was being terminated as of February 15, 1982.

The petitioner was informed at the time that the respondents would be handling sales of its product line in the southeastern United States by telephone and not by direct, in the field contact. The

petitioner was given no consideration for any other or new positions within the respondents' organization. The only field representatives given consideration for retention were two younger individuals.

After terminating the petitioner, the respondents hired Donald Lex, 25 years of age, on July 19, 1982. It was not until late August, 1982, that the petitioner learned that Mr. Lex had been employed in a position substantially comparable to that which had been occupied by the petitioner during the course of his own employment. After learning of Mr. Lex's employment, the petitioner thereupon filed a charge of discrimination with the EEOC District Office in Charlotte, North Carolina on February 3, 1983.

During the course of his employment with the respondents, the petitioner worked almost entirely in the field and was physically present in the respondents' offices in Milwaukee only once each year

and never more than two times in any given year.

Subsequent to the filing of his charge of discrimination with the EEOC District Office, the petitioner thereupon brought an action in the United States District Court for the Western District of North Carolina under the ADEA alleging age discrimination in the employment decision by the respondents to terminate his employment. Following the completion of discovery, the respondents filed a Motion for Summary Judgment in the District Court. The District Court entered an order on October 8, 1986, granting the respondents' Motion for Summary Judgment. The District Court held that the petitioner was time-barred for not having filed a charge of discrimination with the EEOC within 180 days after the alleged unlawful practice occurred and, further, that the petitioner had failed to establish a prima facie case

of prohibited age discrimination sufficient to withstand a Motion for Summary Judgment.

Petitioner then filed a Notice of Appeal and appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals entered a decision on September 15, 1987, affirming the District Court's decision.

The Court of Appeals considered the issue of whether the petitioner had timely filed a charge of discrimination with the EEOC under the concept of equitable tolling. This analysis involved a consideration of whether the respondents properly posted notice of the petitioner's ADEA rights in a reasonable manner and substantially in compliance with the statute and also the respondents giving to the petitioner a pretextual reason for his termination. The Court of Appeals, although acknowledging the analysis of the Fifth Circuit in

a factually similar case, elected to reject the interpretation of the posting requirement expressed in that decision and concluded that because ADEA rights notices were posted on the respondents' facilities in Milwaukee, that there had been compliance with the statute. The Court of Appeals further rejected the petitioner's claim that the actions on the part of the respondents should relieve the petitioner from the statutory limitations period for the filing of his charge of discrimination.

The Court of Appeals further agreed with the District Court that the petitioner had failed to carry his burden of proving that his termination from employment was the result of age discrimination.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT'S INTERPRETATION OF THE
EQUITABLE TOLLING DOCTRINE IS UNDULY
RESTRICTED AND INCONSISTENT WITH THE
DECISIONS OF OTHER CIRCUITS.

The federal courts have repeatedly held that the timeliness requirement contained in the ADEA is a statute of limitations and is subject to waiver, estoppel and equitable tolling. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) and Vance v. Whirlpool Corporation, 716 F. 2d 1010 (4th Cir. 1983). At least one federal court has adopted the view that the 180 day time limit for the filing of a charge of discrimination as contained in the ADEA should be subject to tolling and estoppel because of "....the remedial nature of the legislation and the lack of legal training and guidance for many complainants." Dartt v. Shell Oil

Company, 539 F. 2d 1256 (10th Cir. 1976).

The equitable tolling issue raised by the present case necessarily involves a thorough consideration and analysis of two critical factors: First, the timing of when a complaining party acquires knowledge that an employment discrimination was discriminatory on account of age; and, secondly, the general degree and level of knowledge by a complaining party of his remedies and rights under the ADEA. At the heart of the question in the present case is the issue of whether the time limitation to be imposed upon the petitioner should be held to run from the date he was first notified of his termination or the date on which he first gained knowledge that the employment decision to terminate him was tainted with age discrimination.

The petitioner was informed on February 9, 1982 that he would be terminated from his employment effective February 15, 1982.

The purported explanation for his termination and the only explanation given him initially was that the respondents would be handling his sales territory in the future by telephone contact, rather than having a field representative. It was not until August, 1982, that the petitioner learned that the respondents had employed an individual 40 years younger than the petitioner to perform work that he had performed during his employment. It is not in dispute that the petitioner filed a charge of discrimination with the EEOC within the required 180 day time period after he first learned that he had been replaced by a much younger individual.

The majority view among the federal courts holds that the notice requirements of both Title VII and the ADEA do not begin to run until the employee knew or should have known of the facts that would support a charge of discrimination. Coke v. General Adjustment Bureau, Inc., 616

F. 2d 785 (5th Circ. 1980). Other courts have held that tolling should be allowed where the employer attempts to conceal a discriminatory act or misleads the employee or misrepresents the nature of the discrimination. Meyer v. Reigel Products Corporation, 720 F. 2d 303 (3rd Cir. 1983).

The decision by the Fourth Circuit does not seem to account for the issue of when the petitioner gained knowledge that his termination may have been discriminatory. This issue was analyzed by the Fifth Circuit in Reeb v. Economic Opportunity Atlanta, Inc. 516 F. 2d 924 (5th Cir. 1975). In Reeb, the Fifth Circuit considered that "....secret preferences in hiring and subtle means of illegal discrimination are unlikely to be readily apparent to the individual discriminated against and employers who discriminate often cloak their policies with a semblance of rationality, and may seek to convey to a victim an attitude of neutrality of even sympathy." The

Reeb court concluded that "...the time period prescribed under the statute would not begin to run until the facts that would support a charge of discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff."

The effect of the decision by the Fourth Circuit would be to require that older employees in the work force file charges of discrimination at the time of their termination, all explanations notwithstanding, in the absence of any specific knowledge or belief that they may be the victim of an age-based discriminatory employment decision. Certainly, this "file now, ask questions later" approach is not what was intended by the Congress in adopting the filing limitations.

The petitioner would contend that the better approach would be to reconcile the

decision by the Fourth Circuit with the decisions by either circuits, Coke v. General Adjustment Bureau, Inc., supra and Reeb v. Economic Opportunity Atlanta, Inc., supra. For this reason, petitioner would contend that a writ of certiorari should be entered in this case to review this question raised by the Fourth Circuit's decision.

A second consideration essential to analysis of the equitable tolling issue is the degree of knowledge which a complaining party would be charged with meeting in the context of filing an age discrimination claim. This consideration raises an examination of the "posting" requirements of ADEA and the awareness by an employee of his rights under the ADEA.

It is undisputed in the present case, that the petitioner was not aware of any information posted at the respondents' business premises concerning his rights under the ADEA. Both the District Court

and the Fourth Circuit, in considering this issue, chose to disregard the closest factual case offered by either party on this issue. The facts in the present case are substantially the same as those in Charlier v. S.C. Johnson and Son, Inc., 556 F. 2d 761 (5th Cir. 1977). In Charlier, two employees brought an age discrimination action against their employer after long years of service. Both employees were field salesmen and had very little contact with the employer's regional office. It was undisputed, however, that the employer posted ADEA notices on the bulletin board of its regional offices. The Fifth Circuit considered the difference between employees working in a central physical location, such as a factory or office building, with those employees required to be away from this location for long periods of time. The Fifth Circuit held that the

posting of such notices on the bulletin board at the regional offices by the employer in that case provided the field employees with "...no notice whatsoever." The Court reasoned that "...notice adequate for one group of employees does not necessarily suffice for another group working primarily in a different locality."

In the present case, the Fourth Circuit "with respect" elected to not adopt the interpretation of the posting requirement expressed in Charlier. The Fourth Circuit did acknowledge that "...it might well be desirable to require employers to send ADEA notices to traveling sales representatives and others who work off the company's premises. Congress might adopt such a requirement in the future."

The petitioner would respectfully request that this court reconcile this significant conflict between the circuits by granting the writ in this case to review the decision by the Fourth Circuit.

II.

THE FOURTH CIRCUIT COMMITTED ERROR IN THIS CASE BY RESOLVING GENUINE FACTUAL DISPUTES AND CONCLUDING THAT THE PETITIONER HAD NOT ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION.

It is not disputed in the present case that the order of proof recognized by this honorable court in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973) is applicable to an analysis of whether the petitioner has established the elements of a prima facie case under the ADEA. It is further not disputed that the petitioner has met the first three elements of this test.

It is further clear that a party moving

for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure has the burden of clearly establishing the lack of any triable issue of fact and that all disputed matters and inferences should be resolved in favor of the non moving party. It is not the trial court's function, when considering a motion for summary judgment, to resolve any genuine factual issue. United States v. Diebold, 369 U.S. 654 (1962).

The federal courts have held that a plaintiff need only demonstrate that there are material issues of fact as to the existence of a prima facie case. It is not necessary that he establish the existence of a prima facie case by the preponderance of the evidence. Reardon v. Sharm Steel Corporation, 36 FEP Cases 1824 (W.D. Pa 1985).

The Fourth Circuit adopted the reading of the evidence in this case by the

District Court that all of the evidence on the question of whether the petitioner had made a prima facie case was "...of a piece."

Factual questions abound in the present case as to one of the critical issues involved, that being the degree of restructuring undertaken by the respondents. The District Court found a "...rather complete metamorphosis" of the respondents' organization.

However, the petitioner contends that the respondents experienced a sudden, swift and silent action with regard to its restructuring, without any indication or notice being given to its employees.

Persisnt factual questions exist in this case as to the decision making process for the reorganization of the respondents' organization, whether any consideration was given to retention of the petitioner, and the role which the petitioner's

replacement was to play in the restructured organization. The petitioner would contend that the summary disposition of these factual issues was both inappropriate and inconsistent with the decisions of the federal courts.

The petitioner would request, on this ground also, that this court grant a writ to review the decision by the Fourth Circuit.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The petitioner would respectfully request that this court grant this petition for certiorari to review the decision by the Fourth Circuit and to review the inherent conflicts between the decision by the Fourth Circuit and other circuits.

Respectfully submitted,

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IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
BRYSON CITY DIVISION

C. M. ENGLISH,

CIVIL NO. B-C-85-438

Plaintiff

)

)

versus

)

MEMORANDUM OF DECISION

)

PABST BREWING COMPANY)

and PMP FERMENTATION)

PRODUCTS, INC., a)

wholly owned)

subsidiary of PABST)

BREWING COMPANY,)

)

Plaintiff, a former employee of
defendants, brought this action to Section
7 (b) of the Age of Discrimination in Employ-
ment Act (ADEA) [29 U.S.C. § 626(b)] against
Pabst Brewing Company and PMP Fermentation
Products, Inc. [hereinafter collectively
defendants], his former employers. According
to the undisputed allegations in the file,
defendants, on February 9, 1982, informed
plaintiff that his active employment would be
terminated as of February 15, 1982 (his 65th
birthday). Plaintiff filed his charge of

discrimination with the Equal Employment Opportunity Commission (EEOC) February 3, 1983, claiming that his termination was as a result of his age and constituted unlawful discrimination. On November 21, 1985, he filed this action based on those allegations. After filing Answer and undertaking some discovery, the defendants brought the matter before the court on Motion for Summary Judgment pursuant to Rule 56(b), Fed. R. Civ. P., asserting that no genuine issue of material fact exists. It appears to the court that the defendants' motion is well taken. The facts necessary to the entry of this decision are more fully set forth in the opinion which follows.

I.

Plaintiff's complaint, the undisputed answer, and evidence offered by the defendants in support of their motion make it affirmatively appear that plaintiff's claim is time-barred. the ADEA expressly sets forth a timeliness requirement in 29 U.S.C. § 626 (d), as follows:

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed:

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred or within 30 days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.¹

This provision would appear to be dispositive of defendants' motion and, therefore, plaintiff's claim, as plaintiff did not file with the EEOC until 353 days after his termination and 359 days after he was informed of the termination.² The Fourth Circuit has repeatedly ruled that this section operates as a statute of limitations so that failure to comply with the time requirements will result in dismissal of the action. Lawson v. Burlington Industries, Inc., 683 F. 2d 862 (4th Cir. 1982); Vance v. Whirlpool Corp., n. 2, supra; Price v. Litton Business System, Inc., 694 F. 2d 963 (4th

Cir. 1982). The Fourth Circuit has further upheld the use of summary judgment as a vehicle for the accomplishment of this result. Lawson v. Burlington Industries, Inc., supra. Therefore, this court will allow defendants' Motion for Summary Judgment.

1. Section 14(b) of the ADEA (29 U.S.C. § 633) creates an exception to the 180-day rule. However, the exception applies only in those states which by state statute and through state agency prohibit and provide remedy for age discrimination. North Carolina not being such a state, the exception is not applicable.

2. The date of notification rather than the date of the actual termination would appear to govern. Vance v. Whirlpool Corp., 716 F. 2d 1010 (4th Cir. 1983). However, in this case, the question is not material since the claim is time-barred from either date.

II.

Plaintiff attempts to escape the bar of the timeliness requirement by asserting that since 626(d) creates a statute of limitations rather than a jurisdictional requirement, the running of the 180 days equitably can be tolled. While plaintiff is correct as to the law (Vance v. Whirlpool Corp., supra), the pleadings, affidavits, portions of depositions, and other matters before the court in support of and in opposition to the Motion for Summary Judgment make it plain to the court that, factually, there is no ground for equitable tolling in this case and that no genuine issue of material fact exists as to the absence of any such ground. Plaintiff asserts that the statute should be tolled where the employer has failed to meet the requirements of 29 U.S.C. § 627, which provides that "every employer....shall post and keep posted in conspicuous places upon its premises a notice....appropriate to effectuate the

purposes of this chapter." Again, plaintiff's proposition of law is correct. The Fourth Circuit has so held as to factually appropriate cases. "The 180-day period should be tolled by reason of (the employer's) failure to post the statutory notice."

Vance v. Whirlpool Corp., supra, at 1013.

Furthermore, "once the 180-day period has been tolled due to the employer's failure to post the statutory notice, it has been held that the period will begin to run from the time that the employee acquires actual knowledge of his rights or retains an attorney." Id., at 1013, citing Kephart v. Institute of Gas Technology, 581 F. 2d 1287 (7th Cir. 1978); and Bonham v. Dresser Industries, Inc., 569 F. 2d 187 (3d Cir. 1977, as amended 1978). Again, however, this is not a factually appropriate case.

Factually, plaintiff's argument in opposition to summary judgment on the non-posting ground for tolling of the statute of

limitations leans upon the slender reed of the following sentence in plaintiff's own Affidavit: "My employer had not posted information on the ADEA of which I was aware."

(Emphasis supplied.) This sentence simply does not create a genuine issue of material fact when juxtaposed against defendants' affidavits from present and former employees to the effect that proper posting had in fact been accomplished at the company's plant and corporate headquarters. Defendants, therefore, appear to have established proper posting. "If notice is properly posted and the employee does not see it or sees it but is still not aware of his rights, there will normally be no tolling of the filing period." McClinton v. Alabama Byproducts Corp., 743 F. 2d 1483, 1486 (8th Cir. 1984). To the same effect is Hrzenak v. White Westinghouse Co., 682 F. 2d 714 (8th Cir. 1982). While the Fourth Circuit appears to be silent on this specific question, the Eighth Circuit cases appear

to this court to reach the only reasonable result, and the court will follow them.

Plaintiff argues that the instant case should not be governed by the logic of McClinton and White Westinghouse since plaintiff did not work out of either the headquarters or the plant but apparently worked out of his own home in North Carolina and visited the company facilities in Wisconsin not much more frequently than annually. In support of his argument, he offers Charlier v. S.C. Johnson & Son, Inc., 556 F. 2d 761 (5th Cir. 1977). In that case, as in the case at bar, the plaintiff worked in outside sales and only occasionally visited the facility where the posting had been made. That court held a factual question to exist as to the adequacy of the posting. This court, while noting that the Fifth Circuit decision is not binding precedent, nonetheless would note that in

the instant case there appears to be no dispute of material fact as to the proposition that the employer made all reasonable compliance with the language of 29 U.S.C. § 627 requiring that the posting be "in conspicuous places upon its premises...." The premises as to which affidavits exist were apparently the only facilities which plaintiff ever visited, and one of them was the facility in which he was informed of his termination. Furthermore, this court believes the Eighth Circuit to have been correct in McClinton when it held that the tolling of the statute occasioned by nonposting or inadequate posting would continue only up until such time as "the employee acquires general knowledge of his right not to be discriminated against on account of age, or the means of obtaining such knowledge. We do not think it necessary to toll the notification period up to the time that the employee obtains knowledge of his specific rights

under the ADEA and/or the existence of the 180-day filing period." McClinton v. Alabama Byproducts Corp., supra, at 1486.³ In the case at bar, defendants have offered the court plaintiff's own deposition testimony to the effect that he was generally aware of his rights against age discrimination well before his termination. It appears to the court that where an employee is generally aware of his rights, and where the employer has complied with the language of 29 U.S.C. § 627, to require anything further would not only be unduly burdensome but would render the 180-day requirement of Section 626 meaningless as to any employer of outside salesmen or other employees who are not daily on the employer's actual premises.

3. Plaintiff argues Vance v. Whirlpool Corp., supra for the proposition that the statute remains tolled until the employee acquires specific knowledge of his rights or the advice of counsel. However, the language in that case upon which plaintiff relies has applicaiton only to the distinct

facts then before the court. That plaintiff acquired no knowledge of his rights until after the 180-day period from termination had already expired but during a period in which the statute was tolled by a conceded failure to post. It appears to this court that there is other-language in Vance controlling of the facts in this case. "Ordinarily we would agree with Whirlpool that the 180 day period should be tolled only until such time as an employee observes the statutory notice or otherwise learns of his rights under the ADEA." Id., at 1013 (emphasis supplied).

other employees are not daily on the employer's actual premises.

III.

Plaintiff further argues that the statute should be tolled equitably on the basis of Mayer v. Reigel Products Corp., 720 F.2d 303 (3d Cir. 1983), which held that tolling would be allowed where the employer attempted to conceal a discriminatory act or to mislead the employee or misrepresented the nature of the discrimination. However, plaintiff overlooks the express language from the Fourth Circuit in Price v. Litton Business Systems, Inc., supra, to the effect that, "the statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in a timely fashion is a consequence of either deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." Id., at 965.

In this case, plaintiff's only factual support for this tolling argument is that defendants informed him that they were reorganizing the sales effort based on a new and smaller product line and that the sales job previously handled by him in the field in the southeastern United States would subsequently be handled out of the company's Wisconsin headquarters, principally by telephone. Plaintiff asserts that he was deceived and only later (August 1982) learned that a younger man (a Mr. Lex) was making customer calls in the field in the southeast. However, defendants' affidavits and deposition evidence are undisputedly to the effect that Lex worked out of Wisconsin principally by telephone and made field visits to the southeast only three or four times a year, as opposed to the five-day-a-week visits previously practiced by the plaintiff. The literally or almost literally true statements of the defendants in this case, coupled with the fact that plaintiff's knowledge of the

employment of the younger man came to him through the defendants themselves, makes it appear to this court that there can be no genuine issue of material fact on this proposition. Defendants simply have done nothing rising--or sinking--to the level contemplated by the above-quoted language from Price. Therefore, plaintiff is not entitled to an equitable tolling of the statute of limitations, and defendants are entitled to their summary judgment.

IV.

Finally, even if plaintiff had complied with the timeliness requirements, defendants are nonetheless entitled to their summary judgment. In age discrimination cases, plaintiff has the burden of establishing that the action complained of (in this case, termination) was taken because of age. That is, he must prove that age was a determinative, a "but-for" factor in the decision. See, e.g., Tice v. Lampert Yards, Inc., 761 F. 2d 1210, 1217, 1222

(7th Cir. 1985). The order of proof in ADEA cases is borrowed from McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), requiring, first, the plaintiff to establish a prima facie case; then the defendant to go forward with a nondiscriminatory reason for the employment action; then the plaintiff to establish that the nondiscriminatory reason was a pretext for the forbidden discrimination. EEOC v. Western Electric Corp., 713 F. 2d 1011 (4th Cir. 1983).

In weighing the sufficiency of a plaintiff's evidence and, therefore, in determining for purposes of summary judgment motion the materiality of dispute of fact,

The elements of the plaintiff's "prima facie case" in the usual ADEA case are: (1) the plaintiff is in the protected age group; (2) the plaintiff was discharged or demoted; (3) at the time of the discharge or demotion the plaintiff was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, the plaintiff was replaced by someone of comparable qualifications outside the protected class. Id., at 1014 (emphasis supplied).

Without discussing the first three

elements, the evidence before the court presents no genuine issue as to any fact material to the fourth element. All the evidence on this issue is of a piece, and all reflects that the company underwent a rather complete metamorphosis. New management dropped from the product line the malt syrup which had been plaintiff's main area of expertise. The company's products then included only industrial chemical compounds. The newly hired replacement (Mr. Lex), concededly 40 years younger than the plaintiff, also possessed a cum laude degree in chemistry and three years' experience in chemical sales. Plaintiff had no comparable educational background and was principally experienced in the sale of the malt syrup line. The new job filled by Lex involved a national sales territory; a concentration on long-distance sales out of Milwaukee; and only occasional field visits, few of them in the southeast. Plaintiff's forte had been field work in the southeast and personal

relationships with southeastern customer.
Based upon his undisputed evidence, plaintiff cannot meet the necessary fourth element of the prima facie test and, even had his claim been timely filed, cannot survive defendants' motion for summary judgment.

This court, therefore, is awarding defendants summary judgment by Order filed contemporaneously herewith.

This 8 day of Oct., 1986.

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DAVID B. SENTELLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3148

C. M. ENGLISH,

Plaintiff-Appellant,

versus

PABST BREWING COMPANY;
PMP FERMENTATION PRODUCTS,
INC., a wholly owned
subsidiary of Pabst
Brewing Company,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of North Carolina, at
Bryson City. David B. Sentelle, District
Judge. (CA-85-0438).

Argued: May 8, 1987

Decided: September
15, 1987

Before WIDENER, WILKINSON, and WILKINS,
Circuit Judges.

David Edmund Ralston for Appellant;
Thomas Paul Godar (John R. Sapp; Michael,
Best & Friedrich; Gwynn Radeker; Roberts,
Stevens & Cogburn, P.A. on brief) for
Appellees.

WILKINSON, Circuit Judge:

C. M. English was employed by the Pabst Brewing Company as a sales representative. In February of 1982, Pabst informed English that his employment was to be terminated. English sued under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. The district court granted summary judgment to the defendant because English did not file his ADEA charge within the 180 day period imposed by the statute and because he failed to establish that the termination was based on his age. C. M. English v. Pabst Brewing Co., 645 F. Supp. 186 (W.D.N.C. 1986). We affirm.

1.

At the time his employment with Pabst ended, English sold malt syrup and industrial chemicals to firms in the southeastern United States. English was sixty-five years old. Pabst told him upon his termination that it was restructuring its sales staff and product lines and that the field

work previously handled by him would be handled primarily by telephone from the company's headquarters.

Six months later, in August of 1982, English had a chance encounter with Irvin Troy, his former sales supervisor. Accompanying Troy was Donald Lex, who had been hired by Pabst as a sales representative in July. Lex was twenty-five years old.

Roughly six months after this meeting--359 days after he was notified of his termination -- English filed a charge of age discrimination with the EEOC. After filing his charge with the EEOC, English commenced this civil action. He alleged that Pabst had replaced him with a younger man and thus committed age discrimination. In granting Pabst's motion for summary judgment, the district court held that English's claim was time-barred by the provisions of § 626(d) of the ADEA and that Lex was not English's replacement, but filled a position requiring different skills and expertise

created in the company's reorganization.

II.

The ADEA requires that a plaintiff file a charge with the EEOC before filing a civil action; this charge must normally be filed within 180 days of the discriminatory practice. 29 U.S.C. § 626(d). Where the charge is based on a job termination, the 180-day period runs from the date on which the plaintiff is notified of his termination. Felty v. Graves-Humphreys, 785 F. 2d 516, 518-19 (4th Cir. 1986); Price v. Litton Business Systems, 694 F. 2d 963, 965 (4th Cir. 1982). The limitation period facilitates the prompt resolution of disputes upon fresh recollections. It also reflects the point at which Congress has determined the prospect of litigation should presumptively be laid to rest.

Because the 180-day period is akin to a statute of limitations, rather than a jurisdictional prerequisite to filing suit, a plaintiff can obtain relief from it under

the doctrines of equitable tolling and equitable estoppel. Vance v. Whirlpool Corp., 716 F. 2d 1010, 1011-12 (4th Cir. 1983). Equitable exceptions to the statutory limitations period should be sparingly applied, however. The certainty and repose these provisions confer will be lost if their application is up for grabs in every case. As the equitable exceptions to the charging period have been the subjects of some confusion -- in the present case, for example, the parties used the terms equitable estoppel and equitable tolling interchangeably -- we will review them briefly before applying them to the case before us.

The doctrines of equitable tolling and equitable estoppel have a common original; they are based primarily on the view that a defendant should not be permitted to escape liability by engaging in misconduct that prevents the plaintiff

from filing his or her claim on time. As the Supreme Court explained in Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232-33 (1959),

No man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Equitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action. See Lawson v. Burlington Industries, 683 F.2d 862, 864 (4th Cir. 1982); Cerbone v. International Ladies' Garment Workers' Union, 768 F. 2d 45, 48 (2d Cir. 1985); Meyer v. Riegel Products Corp., 720 F. 2d 303, 307-08 (3d Cir. 1983). To invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge.

Lawson 683 F. 2d at 864; Coke v. General Adjustment Bureau, 640 F. 2d 584,595 (5th Cir. 1981).

Equitable estoppel applies where, despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline. Felty v. Graves-Humphreys, 818 F.2d 1126 (4th Cir. 1987); Price, 694 F. 2d at 965. See also Cerbone, 768 F. 2d at 49-50; Dillman v. Combustion Engineering, 784 F. 2d 57, 60-61 (2d Cir. 1986). "The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." Price, 694 F. 2d at 965.

III.

English seeks to invoke the principle of equitable tolling. He alleges that Pabst

concealed material information from him in two ways: first, by failing to post the required notice about ADEA rights, and second, by giving him a pretextual reason for his termination. Neither allegation is supported by the facts in the summary judgment record, however.

A.

The ADEA requires an employer to post "in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of the ADEA." 29 U.S.C. § 627. Such a notice must be prominently and accessibly placed. 29 U.S.C. § 627; 29 C.F.R. § 1627.10. If an employer violates the posting requirement, the charging period is tolled until the plaintiff "acquires actual knowledge of his rights or retains an attorney." Vance, 716 F.2d at 1013. In the

present case, we believe the district court properly rejected plaintiff's argument that the statutory limitations period should be equitably tolled based on the defendant's noncompliance with the posting requirement:

Factually, plaintiff's argument in opposition to summary judgment on the non posting ground for tolling of the statute of limitations leans upon the slender reed of the following sentence in plaintiff's own Affidavit: "My employer had not posted information on the ADEA of which I was aware." (Emphasis supplied). This sentence simply does not create a genuine issue of material fact when juxtaposed against former employees to the effect that proper posting had in fact been accomplished at the company's plant and corporate headquarters. Defendants, therefore, appear to have established proper posting.

English, 645 F.Supp. at 188. See Posey v. Skyline Corp., 702 F. 2d 102 (7th Cir. 1983) (summary judgment proper where defendant's testimony indicated that ADEA notice was posted and plaintiff stated only that he did not recall seeing one).

English argues that even if the notice was posted, the charging period should still be tolled because he did not read the notice.

This argument misapprehends the nature of equitable tolling, which is based on the wrongdoing of the defendant. Hence, the district court properly rejected it. "If notice is properly posted and the employee does not see it or sees it but is still not aware of his rights, there will normally be no tolling of the filing period."

McClinton v. Alabama By-Products Corp., 743 F.2d 1483, 1486 (11th Cir. 1984); accord Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 718-19 (8th Cir. 1982).

English further argues that the district court erred in applying this rule to field salesmen who infrequently visit the company's offices. He refers us to the Fifth Circuit's decision in Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977), where the court of appeals remanded for a determination of whether a salesman who worked mainly in his home was adequately informed of his rights by an ADEA

notice posted in a regional office. That decision was grounded in the court's understanding that the posting requirement imposes a broad obligation on employers to "provide employees with a meaningful opportunity of becoming aware of their ADEA rights." 556 F.2d at 764.

With respect, we do not adopt the interpretation of the posting requirement expressed in Charlier. It might well be desirable to require employers to send ADEA notices to traveling sales representatives and others who work off the company's premises. Congress might adopt ~~su~~ such a requirement in the future. The terms of the present statute and its implementing regulation, however, require only that the notice be posted "in conspicuous places upon (the employer's) premises." 29 U.S.C. § 627. Pabst complied with the terms of the statute. Notice was posted on the only facilities in the company that plaintiff ever visited, and which plaintiff did visit

when he was informed of his termination. Because there is no genuine dispute of fact as to whether Pabst complied with the notice requirement, English cannot invoke equitable tolling on that basis.

B.

English alleges further that his younger "replacement," Donald Lex, was not hired for some five months after his own termination, that he did not learn of Lex's employment for six months after his discharge, and that he was thus precluded from bringing his ADEA action before that time. While a time bar might be tolled on equitable grounds, "if the employee could show that it would be impossible for a reasonably prudent person to learn that his discharge was discriminatory," Miller v. International Telephone and Telegraph Corp., 755 F.2d 20, 24 (2d Cir. 1985), we do not think English has carried his burden in this regard.

First, there has been no showing that Pabst concealed or misrepresented anything

about its own reorganization or about English's dismissal. Nothing about the timing or the manner of Lex's employment suggests any attempt by the company to induce English to forego his rights and delay filing his ADEA charge. In fact, as the district court noted, "plaintiff's knowledge of the employment of the younger man came to him through the defendants themselves." 645 F.Supp. at 189. Secondly, as discussed fully in the following section, it is doubtful that Lex was in fact a replacement of English at all. (The record indicates that Lex made national contracts from the company's Milwaukee office by telephone; English made personal visits to customers five days a week exclusively in the southeast. Lex sold only chemical products; English sold malt products as well). Third, if Lex's employment had the critical significance English attributes to it, we are unable to understand why he waited nearly six months

more before filing a charge. At bottom, equitable tolling rests upon the proposition that the defendant's actions require relieving the plaintiff from the burden of a statutory limitations period. We cannot perceive in this set of circumstances any reason to overturn the district court's grant of summary judgment and afford plaintiff the extraordinary relief that he requests.

IV.

In addition to his failure to file a timely charge, English's claim also fails on substantive grounds. English has not presented any evidence to show that his termination was the result of age discrimination. "To establish discrimination in an age discrimination case, the plaintiff must prove by a preponderance of the evidence that 'but for' the defendant's motive to discriminate against an older employee, he would not have been terminated."

Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1432 (4th Cir. 1985). Because English failed to carry this burden, the district court properly granted summary judgment on the merits of this case.

Two routes are available for proving "but for" causation in age discrimination cases. The first is to use ordinary means of proof through direct or indirect evidence; the second route -- the one on which English relies -- is the judicially fashioned proof scheme for Title VII cases. Wilhelm, 773 F.2d at 1432; Loveland v. Sherwin Williams Co., 681 F.2d 230, 239-241 (4th Cir. 1982). To establish a prima facie case of discrimination under the Title VII proof scheme, the plaintiff must submit evidence to show

(1) the plaintiff is in the protected age group (2) the plaintiff was discharged or demoted; (3) at the time of discharge or demotion, the plaintiff was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, the plaintiff was

replaced by someone of comparable qualifications outside the protected class.

E.E.O.C. v. Western Electric Co., Inc., 713

F.2d 1011, 1014 (4th Cir. 1983).

We believe the district court correctly analyzed English's case in accordance with this scheme:

Without discussing the first three elements, the evidence before the court presents no genuine issue as to any fact material to the fourth element. All the evidence on this issue is of a piece, and all reflects that the company underwent a rather complete metamorphosis. New management dropped from the product line the malt syrup which had been plaintiff's main area of expertise. The company's products then included only industrial chemical compounds. The newly hired replacement (Mr. Lex), concededly 40 years younger than plaintiff, also possessed a cum laude degree in chemistry and three years experience in chemical sales. Plaintiff had no comparable educational background and was principally experienced in the sales of the malt syrup line. The new job filled by Lex involved a national sales territory; a concentration on long-distance sales out of Milwaukee; and only occasional field visits, few of them in the Southeast. Plaintiff's forte had been field work in the southeast and personal relationships with southeastern customers. Based upon this undisputed evidence, plaintiff cannot meet the necessary fourth element of

the prima facie test and, even had his claim been timely filed, cannot survive defendants' Motion for Summary Judgment.

English, 645 F.Supp. at 190.

The judgment of the district court is therefore

AFFIRMED.

